

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MICHAEL JAMES HINDS,

No. C 06-5283 WHA (PR)

Petitioner,

**ORDER DENYING MOTION
TO RECONSIDER AND
DENYING CERTIFICATE OF
APPEALABILITY**

v.

A. P. KANE, Warden,

Respondent.

This is a habeas case under 28 U.S.C. § 2254 filed pro se by a state prisoner. The Court granted respondent's motion to dismiss on statute of limitations grounds. Petitioner has filed a motion to reconsider and a notice of appeal.

Whether the petition in this case was timely turned on whether petitioner was entitled to tolling for the 194 days between dismissal of a state habeas petition he had filed in the wrong court and his refileing it in the right one. This turned on whether the California courts would have considered that a “reasonable time” for filing in the next court. *See Evans v. Chavis*, 546 U.S. 189, 197 (2006). The time at issue in *Evans* was 180 days. There the Court held that not to have been a reasonable time, which suggests that the longer time here also was not reasonable, and petitioner’s contentions as to the reasons for his delay – principally that he wanted to improve his petition – are not sufficient to distinguish *Evans*. The conclusion here that the delay was not reasonable was correct. *See id.* And contrary to petitioner’s contention, the limitation period was not tolled for ninety days to allow a petition to the United States

1 Supreme Court for certiorari after rejection of his last habeas petition by the California Supreme
2 Court. *See Lawrence v. Florida*, 127 S. Ct. 1079, 1086 (2007); *White v. Klitzkie*, 281 F.3d 920,
3 924 (9th Cir. 2002) (citing decisions from other circuits). The motion to reconsider will be
4 denied.

5 Petitioner also has filed a notice of appeal. Although he has not moved for a certificate
6 of appealability, the notice of appeal will be treated as such a motion. *See United States v.*
7 *Asrar*, 116 F.3d 1268, 1270 (9th Cir. 1997).

8 A petitioner may not appeal a final order in a federal habeas corpus proceeding without
9 first obtaining a certificate of appealability. *See* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).
10 Section 2253(c)(1) applies to an appeal of a final order entered on a procedural question
11 antecedent to the merits, for instance a dismissal on statute of limitations grounds, as here. *See*
12 *Slack v. McDaniel*, 529 U.S. 473, 483 (2000).

13 “Determining whether a COA should issue where the petition was dismissed on
14 procedural grounds has two components, one directed at the underlying constitutional claims
15 and one directed at the district court’s procedural holding.” *Id.* at 484-85. “When the district
16 court denies a habeas petition on procedural grounds without reaching the prisoner’s underlying
17 constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason
18 would find it debatable whether the petition states a valid claim of the denial of a constitutional
19 right and that jurists of reason would find it debatable whether the district court was correct in
20 its procedural ruling.” *Id.* at 484. As each of these components is a “threshold inquiry,” the
21 federal court “may find that it can dispose of the application in a fair and prompt manner if it
22 proceeds first to resolve the issue whose answer is more apparent from the record and
23 arguments.” *Id.* at 485. Supreme Court jurisprudence “allows and encourages” federal courts
24 to first resolve the procedural issue, as was done here. *See id.*

25 As discussed above, the petition was dismissed because without the tolling for the
26 unreasonable 194 days between state court filings the petition here was untimely. Because
27 jurists of reason would not find debatable the conclusion that the delay was unreasonable, the
28 motion for a certificate of appealability will be denied.


CONCLUSION

The motion to reconsider (document number 14 on the docket) and the motion for a certificate of appealability inferred from the notice of appeal are **DENIED**.

The clerk shall transmit the file, including a copy of this order, to the Court of Appeals. *See* Fed. R.App.P. 22(b); *United States v. Asrar*, 116 F.3d 1268, 1270 (9th Cir. 1997). Petitioner may then ask the Court of Appeals to issue the certificate, *see* R.App.P. 22(b)(1), or if he does not, the notice of appeal will be construed as such a request, *see* R.App.P. 22(b)(2).

IT IS SO ORDERED.

Dated: April 8, 2008.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE